Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1996

VELTRAN TRUJILLO, SR., and GLORIA TRUJILLO, as next friends and Guardians of their minor child, VELTRAN TRUJILLO, JR.,

Petitioners,

vs.

TAOS MUNICIPAL SCHOOLS, a New Mexico School District, HAROLD BREEN, individually and as a member of the TAOS MUNICIPAL SCHOOL BOARD, JOE MC GINNIS, individually and as a member of the TAOS MUNICIPAL SCHOOL BOARD, IGNACIO PERALTA, individually and as a member of the TAOS MUNICIPAL SCHOOL BOARD, BOB ROMERO, individually and as a member of the TAOS MUNICIPAL SCHOOL BOARD, JUAN ARAGON, Individually and in his capacity as Superintendent of Taos Municipal Schools, RUBEN R. QUINTANA Individually and in his capacity as Principal of Taos Junior High School, and IRENE HERN, Individually and in her capacity as the Assistant Principal of Taos Junior High School,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a student is suspended or permanently expelled from an entire public school district for life and is refused any hearing beyond the minimal requirements of *Goss*,[1] is that a denial of due process?

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[1] *Goss v. Lopez*, 419 U.S. 565 (1975).

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgement is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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The opinion of the Tenth Circuit Court of Appeals was not reported and is reproduced in the Appendix ("App.") filed herewith at A. The unreported opinion of the district court in this case is reproduced at App. B and C.

STATEMENT OF JURISDICTION

The Federal District Court entered its Order on August 11, 1995. The Federal District Court jurisdiction was based on the Fourteenth Amendment to the United States Constitution and on 42 USC § 1983. The Court of Appeals entered its judgement on July 1, 1996. The jurisdiction of this Court is invoked under Constitution Provision and 42 U.S.C. § 1983.

STATUTE INVOLVED

The pertinent provision of Section 1 of the Fourteenth Amendment to the United States Constitution is set forth below:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1983, is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners' claims arise from the circumstances surrounding the permanent expulsion of Veltran Trujillo, Jr., (hereinafter "Student") from Taos Municipal Schools by Respondent Ruben Quintana (hereinafter "Principal Quintana"), Principal of Taos Junior High School, for having a gun in school.

The uncontroverted facts establish that in November of 1993, Student was enrolled in the seventh grade at Taos Junior High School. He was an honor student, maintaining a grade point average above 3.5, participated in many extracurricular activities, had never been previously disciplined by the school, had never had any referrals to the juvenile criminal justice system, and had at no time been

alleged to have associated with or participated in gang activities. On November 15, 1993, Student carried an .22 caliber pistol to school which could not fire and was generally inoperable. When confronted by school officials, Student acknowledged that he had the gun in his locker and turned it over to them whereupon he was immediately removed from the school.

On November 17, 1993, Assistant Principal Irene Hern sent a notice of hearing to Petitioners. The notice of hearing indicated that Student had violated the school's "Weapons policy" by "[c]arrying a gun on campus" and that the purpose of the hearing was "[t]o determine if student shall . . . [b]e recommended for expulsion." A Note on the notice indicated that "Expulsion from *school* is permanent (emphasis added)." The hearing was set for 10:00 a.m., on November 30, 1993, before Principal Quintana.

The hearing took place as scheduled and both of Student's parents attended, along with Principal Quintana and Assistant Principal Hern. At the hearing, Plaintiffs were informed that Student was being "suspended or expelled from Taos Municipal Schools." A few days following the hearing, Student's mother called Principal Quintana to ask what the exact period of the suspension or expulsion was. Principal Quintana told her it was for life. Shortly afterwards, being unable to believe the severity of the punishment of her son, she visited Principal Quintana and told him she did not understand how long her son was expelled. Principal Quintana told her that Student was expelled from the school district for six years and advised her to enroll him in the Questa or Penasco public schools.

A written decision was mailed to Petitioners on December 17, 1993. In it, Principal Quintana stated:

> After a careful review of the evidence, presented by Mrs. Hern, I am upholding her recommendation. The evidence she presented is as follows: Mrs. Florence Quintana (Guidance Counselor) informed Mrs. Hern that Veltran Trujillo had a gun in his P.E. locker. Second, in asking Veltran to empty his pockets he pulled out a clip with 5-.22 bullets. Third, in Mrs. Hern's presence he admitted to me to having a gun in his P.E. locker. He opened his locker and I removed the gun.
>
> Because of the seriousness of this incident, having a firearm in school, I feel that Mrs. Hern's recommendation for expulsion from Taos Schools is fair and just. If you have any questions, call . . .

Student's teachers recommended that he not be expelled.

The school referred the offense to the local juvenile prosecution agency and on January 21, 1994, Student was alleged to be a "delinquent child in need of care and supervision" in the Children's Division of the Taos District Court for having unlawfully carried a .22 caliber pistol to Taos Junior High School on November 15, 1993. Student admitted the allegations and a "Consent Decree" was entered on February 9, 1994. This was Student's first juvenile offense. The Consent Decree required Student to be on probation for six months after which, if satisfactorily completed, the Petition would be dismissed. Student complied with all terms of the consent decree. His behavior while on probation was so exemplary that the

juvenile probation office provided Student with a free day of skiing at the Taos Ski Valley. Six months after his probation began, the Petition filed against Student was dismissed.

The six months of punishment Student received from the juvenile criminal justice system was a sharp contrast to the lifetime punishment he received from Respondents.

On February 4, 1994, Student, by letter through counsel, requested that Principal Quintana advise him of the exact period of his expulsion. Principal Quintana did not respond to this written request. Student's counsel again requested this information by letter of March 10, 1994, and also asked that a "Grievance Hearing" be scheduled. Principal Quintana scheduled the "Grievance Hearing" for April 14, 1994, and he, Assistant Principal Hern, and Mrs. Gloria Trujillo and her counsel attended. At the hearing, Principal Quintana refused to reconsider Student's expulsion. He also advised Petitioners to see Superintendent Aragon if they were unsatisfied with the decision.

Petitioners' counsel requested by letter on April 20, 1994, that Superintendent Juan Aragon (hereinafter "Superintendent") reconsider Student's expulsion and meet with Petitioners and their counsel. Superintendent Aragon stated by letter of April 26, 1994, that he would notify Petitioner's counsel of the time and date for a meeting as soon as he met with appropriate staff and reviewed the case. Superintendent Aragon never scheduled a meeting.

The nearest public schools are 20 to 30 miles away. Following his expulsion from Taos Public Schools, Student attended a private school in Taos. At the time of his expulsion, Student's mother was a waitress at a local restaurant, Dori's Kitchen. His father was an attendant at a local Chevron station. In order to pay for the private school, Student's mother had to get a second job and Student himself had to get a job after school. Far from being the career criminal that the school has made out Student to be, and despite the financial shortfalls, Student has excelled in private school.

On November 23, 1994, Petitioners filed a Complaint against the Respondents. In Count I of the First Amended Complaint, Petitioners alleged violation of the Fourteenth Amendment of the United States Constitution in that Student was being punished without adequate written notice to him and his parents of the possible penalties resulting from the charges against him; punished by authorities who lack adequate authority for imposing the particular penalty imposed; denied educational and recreational amenities and benefits other children in his area enjoy; treated differently from other pupils in the school; punished arbitrarily without reasonable basis; denied access to public education; and denied the right to appeal to a higher authority the decision expelling him. Counts II and III allege breach of contract and prima facie tort, respectively.

On August 11, 1995, District Judge C. Leroy Hansen granted the Respondents' Motion for Summary Judgement and dismissed Petitioners' Complaint on the grounds that the Respondents were entitled to qualified immunity. The Judge found that while the due process

parameters for short term suspensions of students from public schools have been established by the Supreme Court,

> The [Supreme] Court, to date, has not spoken specifically to what is required for longer suspensions and expulsion. Additionally, no Tenth Circuit cases have been brought to this Court's attention, and it, too, was found none in its research.

App. C at 24a. The District Court, having no guidance from the Supreme Court, chose not to act.

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed District Court's Order.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to establish what due process protections a student is entitled to when facing long term suspension or expulsion. In *Goss v. Lopez,* the Supreme Court held that while the right to a public education is not a fundamental, constitutional right, once a state has extended the right of education, it must meet minimal due process requirements when depriving students of that right, 419 U.S. 565, 572-574 (1975). In the case of students facing suspension of 10 days or less, the *Goss* Court held that due process requires that the student and his parents be given oral or written notice of the charges against the student and an opportunity to be heard.

The Supreme Court further states, however, that "[l]onger suspensions or expulsions for the remainder of

the school term or permanently, may require more formal procedures." *Id.* at 584. The Supreme Court has not spoken specifically as to what is required for those longer suspensions and expulsions.

The decision by the United States Court of Appeals for the Tenth Circuit in this case demonstrates the continued danger for students and school boards in fashioning due process procedures for students facing long term expulsion. Essentially, the Students have no specifically recognized protections and the School Boards have no specific guidance in fashioning expulsion procedures. In this case, the Courts, finding no guidance from the Supreme Court on the issue, refused to remedy the obvious wrong that occurred.

As the number of students carrying guns in schools has increased, the issue of the treatment of students who are caught carrying guns in school has come to the forefront of public policy. It is an issue that needs to be addressed by this Court. Congress has attempted to deal with the issue by passing the Gun Free Schools Act of 1994, 33 U.S.C. § 3351, supplementing the Gun Free Schools Act of 1990, 18 U.S.C. §§ 921-924, which required that any student caught carrying a gun in school be suspended for a minimum of one year. Congress has partially addressed the problem but now it is up to the Court to finish the task.

Congress has resolved the punitive consequences for carrying a gun in school but there exists a gaping hole with regards to what constitutional protections a student, when suspended from school or the entire school district for one year or more, is entitled to receive. In the Gun

Free Schools Act of 1990 or 1994, Congress failed to specifically spell out what due process protections a student facing long term expulsion is entitled to receive. This is the province of the Court and the Court needs to act.

WHERE A STUDENT IS SUSPENDED OR PERMANENTLY EXPELLED FROM AN ENTIRE PUBLIC SCHOOL DISTRICT FOR LIFE AND IS REFUSED ANY HEARING BEYOND THE MINIMAL REQUIREMENTS OF *GOSS*, IS THAT A DENIAL OF DUE PROCESS?

The District Court opinion recognized in this case that while Student was treated miserably by the Respondents, there was no case which established what specific due process protections Student was entitled to receive. The Court failed to remedy the wrong that had occurred and failed to recognize that Student, facing as lifetime (or 6 years) expulsion from school, was entitled to more due process protections than a student facing ten days of suspension.

The burden to provide due process to a student is on the school, not the student. *Fiedler v. Board of Education of the School District of Winnebago*, 346 F. Supp. 722 (D. Neb. 1972). Where there is a deprivation of constitutionally protected rights in suspension/expulsion procedures, it is duty of Courts to remedy the wrong. *Graham v. Knutzen*, 362 F. Supp. 881 (1973).

Education is the very foundation of good citizenship: as a result, deprivation of a child's education is a very serious matter which requires significant procedural safeguards. *Carey v. Maine School Administrative District #17*,

754 F. Supp. 906, 918 (D. Maine 1990), citing *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873 (1954). In school discipline cases, the nature of the sanction affects the validity of the procedure used in posing it. *Farrell v. Joel*, 437 F.2d 160 (1971).

Expulsion is the most "extreme" punishment that could be meted out to a student. *Farrell v. Joel, Id.* Here, Student committed a crime on school grounds and was given the school district's equivalent of the death penalty, i.e. permanent expulsion. Because Student faced the most extreme punishment, he was entitled to the Cadillac treatment of due process. Instead, Student was given the most minimal due process protections enunciated in *Goss*.

Student, when facing a permanent and lifetime expulsion from school, is entitled to at least, the right of review of the decision of the original "hearing authority" suspending or expelling him by the Superintendent of the school or by the school board itself. Here, Student was entitled to have the Superintendent of Taos Municipal Schools or the Taos Municipal Schools Board of Education review Principal Quintana's decision expelling him. Such a review was promised in the New Mexico Board of Education's regulations, and the Superintendent recognized this right. Instead, what happened was that, on the recommendation of the Principal, Student appealed the expulsion decision to the Superintendent. The Superintendent acknowledged receiving the appeal and promised to promptly set up a hearing. However, the Superintendent never set up the hearing. Student was denied his right to appeal.

In all of the cases cited by the District Court in its decision, the student was allowed to appeal to the Superintendent or the school board the initial decision suspending or expelling him or her. In these cases, the Courts held that students had received sufficient due process in their suspensions or expulsions. However, none of these cases dealt with a student facing expulsion of six (6) years.

Finally, there has been no reported case where a student was expelled for six years. In all the reported cases where a student was expelled for more than 10 days, the student was allowed to appeal to a higher authority the decision suspending or expelling him. Is this truly a "right" or a "privilege"? This issue had not been addressed by the Circuit Courts or the Supreme Court.

CONCLUSION

This case begs for a Supreme Court decision. The undisputed facts are that an exemplary Student was expelled for no reason other than the fact that he was carrying a gun in school. While carrying a gun in school is indeed serious, the peripheral issues that have plagued other cases, i.e. gang involvement, long disciplinary history, prior or current threats to teachers, are not present here. This case is front and center about the due process given a student facing the permanent expulsion from a school district for life for carrying a gun in school. Congress has acted on the problem of guns in schools but has not addressed the due process questions related to the

accompanying long term expulsions. The Court needs to act. For the reasons stated the Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VELTRAN TRUJILLO, SR.; GLORIA TRUJILLO as next of friends and guardians of their minor child VELTRAN TRUJILLO, JR.,

Plaintiffs-Appellants,

v.

TAOS MUNICIPAL SCHOOLS, a New Mexico School District; HAROLD BREEN; JOE MCGINNIS; IGNACIO PERALTA; BOB ROMERO, individually and as members of the Taos Municipal School Board; JUAN ARAGON, individually and in his capacity as Superintendent of Taos Municipal Schools; RUBEN R. QUINTANA, individually and in his capacity as Principal of Taos Junior High School; IRENE HERN, individually and in her capacity as the Assistant Principal of Taos Junior High School; BOARD OF EDUCATION, Taos Municipal Schools,

Defendants-Appellees.

No. 95-2192
(D.C. No.
CIV-94-1350)
(Dist. of New Mexico)

ORDER AND JUDGMENT*

(Filed Jul. 1, 1996)

Before **ANDERSON, BARRETT, and MURPHY,** Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellants, Veltran Trujillo, Sr. and Gloria Trujillo, appeal the district court's Order granting summary judgment, in part, in favor of appellees and dismissing their state law claims without prejudice.

Facts

Appellants filed this action for declaratory relief, injunctive relief, and damages as next of friends and guardians of their son, Veltran Trujillo, Jr. (Trujillo), based on alleged violations of Trujillo's constitutional rights,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of Tenth Cir. R. 36.3.

laws of the United States, breach of contract, and prima facie tort. Appellants' claims arose out of the circumstances surrounding the permanent expulsion of Trujillo from Taos Municipal Schools by appellee, Ruben R. Quintana (Quintana), Principal of Taos Junior High School. The undisputed facts are as follows.

In November, 1993, Trujillo was enrolled in the seventh grade at Taos Junior High School. On November 15, 1993, Trujillo carried a .22 caliber pistol to school. When confronted by school officials, Trujillo admitted that he had a gun in his physical education locker and turned it over to them.

On November 17, 1993, Assistant Principal Irene Hern (Hern) sent a notice of hearing to Trujillo's parents, appellants. The notice of hearing indicated that Trujillo had violated the "weapons policy" by "carrying a gun on campus" and that the purpose of the hearing was "[t]o determine if student shall . . . [b]e recommended for expulsion." (Plaintiff-Appellant's Corrected Brief in Chief at 263).

At the hearing, appellants were informed that Trujillo was being "suspended or expelled from Taos Municipal Schools." Shortly thereafter, Gloria Trujillo visited Quintana and asked how long Trujillo was expelled. Quintana responded that Trujillo was expelled for the remainder of the school year and advised her to enroll him in the Questa or Penasco public schools. On December 17, 1993, a written decision was mailed to appellants in which Quintana upheld the recommendation of Hern and expelled Trujillo from Taos Municipal Schools.

On February 4, 1994, Trujillo, by letter and through counsel, requested that Quintana advise him of the exact period of his expulsion. On March 10, 1994, Trujillo again wrote Quintana and requested a "Grievance Hearing." A grievance hearing was set for April 14, 1994. At the hearing, Quintana refused to reconsider Trujillo's expulsion and advised appellants to see Superintendent Aragon if they were unsatisfied with his decision.

On April 20, 1994, Trujillo requested Superintendent Aragon reconsider his expulsion. Superintendent Aragon responded by letter of April 26, 1994, that he would notify appellants of the time and date for a meeting as soon as he met with the appropriate staff and reviewed the case. No meeting was ever scheduled or held.

Thereafter, appellants initiated this action. Appellees moved for summary judgment on the grounds that they are entitled to qualified immunity, appellants were provided due process, and appellants failed to exhaust their post-deprivation administrative remedies. Appellants moved for summary judgment on their claims of violation of their right to procedural due process, equal protection, and breach of contract.

On August 10, 1995, the district court granted summary judgment in favor of appellees on appellants' due process and equal protection claims and dismissed without prejudice appellants state law breach of contract and tort claims.

Discussion

On appeal, appellants contend that the district court erred in granting appellees' motion for summary judgment and denying their motion for summary judgment. Appellants assert that appellees are not entitled to qualified immunity and that Trujillo was not afforded procedural or substantive due process.

We review a district court's grant or denial of summary judgment *de novo. Lancaster v. Air Line Pilots Ass'n Int'l,* 76 F.3d 1509, 1516 (10th Cir. 1996). We apply the same legal standard used by the district court and examine the record to determine if any genuine issue of material fact was in dispute. *Purrington v. University of Utah,* 996 F.2d 1025, 1028 (10th Cir. 1993) (citing *Applied Genetics Int'l Inc. v. First Affiliated Sec. Inc.,* 912 F.2d 1238, 1241 (10th Cir. 1990)). If there is no material dispute of fact, we determine if the substantive law was correctly applied. *Purrington* 76 F.3d at 1516.

In its order, the district court concluded that "[t]he law is clearly established . . . as to a student's constitutional right to notice and opportunity to be heard in regard to expulsion from public school. Thus, [appellants'] allegations of insufficient notice and improper hearing procedures withstand [appellees'] claim of qualified immunity." (Plaintiff-Appellant's Corrected Brief in Chief at 277). However, the court concluded that since there are no cases establishing a constitutional right to appeal, appellees were entitled to qualified immunity on appellants' claim of a violation of their right to appeal Trujillo's expulsion. *Id.*

In analyzing appellants' procedural due process claims, the district court concluded that appellants "had sufficient notice of serious consequences stemming from having a gun in school," *id.* at 279; although failure to notify a parent of the possible punishments is not a violation of due process, appellants had adequate notice of the possible penalty in the written notice of charges, *id.* at 279-80; in light of an admission of guilt, a hearing is required only to determine proper punishment and allow the student to present mitigating circumstances and appellants were afforded this opportunity, *id.* at 281; although a written decision containing the findings of fact to support the expulsion is not required by due process, appellants received a written decision which clearly stated the circumstances and the decision, *id.*; appellants failed to provide any evidence to support the allegation that Trujillo was denied a fair and impartial hearing, *id.* at 282; and Quintana had ample authority to expel Trujillo. *Id.*

Finally, the district court recognized that the right to a public education, although a constitutional right, was not a fundamental right. Therefore, the court concluded that appellants' substantive due process and equal protection claims failed because "expelling a student for carrying a gun to school is certainly rationally related to the vital state interest in providing a safe environment conducive to learning, protecting students and staff, and maintaining discipline in public schools." *Id.* at 283. We agree.

We affirm substantially for the reasons set forth in the district court's Order of August 10, 1995.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VELTRAN TRUJILLO, SR., and
GLORIA TRUJILLO, as Next Friends
and Guardians of their Minor
Child, VELTRAN TRUJILLO, JR.,

Plaintiffs,

-vs- No. CIV 94-1350 LH/LCS

TAOS MUNICIPAL SCHOOLS, a New Mexico
School Board, HAROLD BREEN, individually
and as a member of the TAOS MUNICIPAL
SCHOOL BOARD, JOE MCGINNIS, individually
and as a member of the TAOS MUNICIPAL
SCHOOL BOARD, IGNACIO PERALTA,
individually and as a member of the
TAOS MUNICIPAL SCHOOL BOARD, BOB ROMERO,
individually and as a member of the TAOS
MUNICIPAL SCHOOL BOARD, JUAN ARAGON,
individually and in his capacity as
Superintendent of Taos Municipal
Schools, RUBEN R. QUINTANA, individually
and in his capacity as Principal of Taos
Junior High School, and IRENE HERN,
individually and in her capacity as the
Assistant Principal of Taos
Junior High School,

Defendants.

ORDER

(Filed Aug. 10, 1995)

THIS MATTER comes on for consideration of Defendants' Motion for Summary Judgment (Docket No. 6), filed January 6, 1995, Plaintiffs' Motion for Summary Judgment (Docket No. 16), filed March 7, 1995, Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 39), filed July 14, 1995, and Defendants' Motion for Extension of Time in Which to Answer First Amended Complaint (Docket No. 41), filed July 27, 1995. The Court, having reviewed the motions, the accompanying memoranda, and the applicable law; having heard oral argument on the cross motions for summary judgment; and having entered its memorandum opinion contemporaneously herewith, finds that Defendants' Motion for Summary Judgment is well taken in part and will be granted in part, Plaintiffs' Motion for Summary Judgment will be denied as moot, Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint is not well taken and will be denied, and Defendants' Motion for Extension of Time in Which to Answer First Amended Complaint will be denied as moot.

WHEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendants' Motion for Summary Judgment be, and hereby is, **granted in part;**

2. Plaintiffs' Motion for Summary Judgment be, and hereby is, **denied as moot;**

3. Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint be, and hereby is, **denied;**

4. Defendants' Motion for Extension of Time in Which to Answer First Amended Complaint be, and hereby is, **denied as moot;** and

5. All claims over which this Court has original jurisdiction having been dismissed and the Court having declined to exercise supplemental jurisdiction, this matter be, and hereby is **dismissed.**

/s/ C. LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VELTRAN TRUJILLO, SR., and
GLORIA TRUJILLO, as Next Friends
and Guardians of their Minor
Child, VELTRAN TRUJILLO, JR.,

Plaintiffs,

vs. No. CIV 94-1350 LH/LCS

TAOS MUNICIPAL SCHOOLS, a New Mexico
School Board, HAROLD BREEN, individually
and as a member of the TAOS MUNICIPAL
SCHOOL BOARD, JOE MCGINNIS, individually
and as a member of the TAOS MUNICIPAL
SCHOOL BOARD, IGNACIO PERALTA,
individually and as a member of the
TAOS MUNICIPAL SCHOOL BOARD, BOB ROMERO,
individually and as a member of the TAOS
MUNICIPAL SCHOOL BOARD, JUAN ARAGON,
individually and in his capacity as
Superintendent of Taos Municipal
Schools, RUBEN R. QUINTANA, individually
and in his capacity as Principal of Taos
Junior High School, and IRENE HERN,
individually and in her capacity as the
Assistant Principal of Taos Junior
High School,

Defendants.

MEMORANDUM OPINION

(Filed Aug. 10, 1995)

THIS MATTER comes on for consideration of Defendants' Motion for Summary Judgment[1] (Docket No. 6), filed January 6, 1995, Plaintiffs' Motion for Summary Judgment (Docket No. 16), filed March 7, 1995, Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 39), filed July 14, 1995, and Defendants' Motion for Extension of Time in Which to Answer First Amended Complaint (Docket No. 41), filed July 27, 1995. The Court, having reviewed the motions, the accompanying memoranda, and the applicable law; having heard oral argument on the cross motions for summary judgment; and being fully apprised in the premises, finds that Defendants' Motion for Summary Judgment is well taken in part and will be granted in part, Plaintiffs' Motion for Summary Judgment will be denied as moot, Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint is not well taken and will be denied, and Defendants' Motion for Extension of Time in Which to Answer First Amended Complaint will be denied as moot.

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[1] Defendants originally denominated their motion as one for judgment on the pleadings. Due to their inclusion of matters outside the pleadings, however, this motion is treated as one for summary judgment and has been fully briefed by the parties as such. *See* FED. R. CIV. P. 12(c); D.N.M.LR-Cv 10.3.

I. DEFENDANTS' APPEAL OF MAGISTRATE JUDGE'S ORDER GRANTING PLAINTIFFS, MOTION FOR LEAVE TO AMEND COMPLAINT

The Court first considers Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint. Pursuant to FED. R. CIV. P. 72(a), on objection, a district judge shall modify or set aside any portion of a magistrate judge's order on a nondispositive matter if it is found to be clearly erroneous or contrary to law. Defendants contend that the magistrate's order should be modified because Plaintiffs' motion was untimely and Plaintiffs knew or should have known of the allegations contained in the first amended complaint when they filed their original complaint.

The Court finds that the magistrate ruling was not clearly erroneous or contrary to law. While untimeliness and prior knowledge of the proposed amendment are sufficient causes for denial, *see, e.g., Pollottino v. City of Rio Rancho,* 31 F.3d 1023, 1027 (10th Cir. 1994) (motion filed eight months after original complaint and over five months after previous amendment; proposed theory previously known but not advanced until primary theory dismissed); *Frank v. U. S. West, Inc.,* 3 F.3d 1357, 1365-66 & n.9 (10th Cir. 1993) (motion filed four-and-a-half months after court's deadline for amending pleadings; counsel conceded failure to previously add defendant was strategic decision), this matter does not rise to that level. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." Additionally, "[r]efusing leave to amend is generally only justified upon a showing of undue delay,

undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank*, 3 F.3d at 1365. Therefor, the Court will not overrule the magistrate's order, and Defendants' Appeal of Magistrate Judge's Order Granting Plaintiffs' Motion for Leave to Amend Complaint will be denied.[2]

II. BACKGROUND

Plaintiffs bring this civil action for declaratory and injunctive relief and damages based on alleged violation of the United States Constitution, the laws of the United States, breach of contract, and prima facie tort. They claim jurisdiction lies with this Court pursuant to 28 U.S.C. §§ 1343, 1344,[3] 42 U.S.C. § 1983, and the Fourteenth Amendment of the United States Constitution.

Plaintiffs' claims arise from the circumstances surrounding the permanent expulsion of Veltran Trujillo, Jr., (hereinafter "Student") from Taos Municipal Schools by Defendant Quintana, Principal of Taos Junior High

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[2] The Court also takes into consideration Plaintiffs' assertion that the "amendments . . . are, with the exception of the addition of the Taos Municipal Schools Board of Education, *procedural, if not outright cosmetic.*" (Pls.' Resp. and Obj. to Defs.' Appeal ¶ 4 (emphasis added)). Accordingly, the Court finds that the amendment of the complaint does not substantively affect the pending cross motions for summary judgment, and they will therefor be ruled upon based on Plaintiffs' allegations in the first amended complaint.

[3] The Court will not address whether it has jurisdiction pursuant to "§ 1344. Election disputes," except to express its skepticism.

School, for having a gun in school. The uncontroverted facts establish that in November, 1993, Student was enrolled in the seventh grade at Taos Junior High School. He was an honor student, maintaining a grade point average above 3.5, participated in many extracurricular activities, and had at no time been alleged to have participated in gang activities. On November 15, 1993,[4] Student carried a .22 caliber pistol to school.[5] When confronted by school officials, Student acknowledged that he had the gun in his locker and turned it over to them.

On November 17, 1993, Assistant Principal Hern sent a notice of hearing to Plaintiffs. The notice of hearing indicated that Student had violated the "Weapons policy" by "Carrying a gun on campus" and that the purpose of

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[4] Although the date in question is given as Nov. 5, 1994 in both the first amended complaint at ¶ 10 and Plaintiffs' Statement of Undisputed Material Facts, Mem. of Law in Supp. of Pls.' Mot. for Summ. J. at 2, it was Nov. 15, 1993. The actions complained of contained through April, 1994, and Plaintiffs filed suit in this Court on Nov. 23, 1994.

[5] Plaintiffs asserted for the first time in their Reply Mem. of Law in Supp. of Pls.' Mot. for Summ. J., Aff. of Veltran Trujillo Jr. at ¶ 2-3, that the gun was inoperable, *see also* First Am. Compl. at ¶ 14, and that Student took it to school to return to his cousin, also a junior high school student, after he failed in his effort to repair it the evening before. Defendants have not had the opportunity to respond to this allegation. The Court, however, finds it irrelevant to the matter at hand. The Court will not retroactively impose a duty on school officials to have distinguished and administered punishment based on whether the handgun was operable or inoperable. Plaintiffs were afforded an opportunity to bring any mitigating information before Principal Quintana on Nov. 30, 1993, but do so for the first time 17 months later.

the hearing was "[t]o determine if student shall . . . [b]e recommended for expulsion." (Mem. of Law in Supp. of Pls.' Mot. for Summ. J. Ex. 1.) The notice further stated that "Expulsion from school is permanent." *Id.* The hearing was set for 10:00 a.m., on November 30, 1993, before Principal Quintana.

The hearing took place as scheduled and both of Student's parents attended, along with Principal Quintana and Assistant Principal Hern. At the hearing, Plaintiffs were informed that Student was being "suspended or expelled from Taos Municipal Schools." (First Am. Comp. at ¶ 19.) A few days following the hearing, Student's mother called Principal Quintana to ask what the exact period of the suspension or expulsion was. Shortly afterwards, she visited Principal Quintana and told him she did not understand how long her son was expelled. Principal Quintana told her that Student was expelled for his remaining time in school and advised her to enroll him in the Questa or Penasco public schools.

A written decision was mailed to Plaintiffs on December 17, 1993. In it, Principal Quintana stated:

> After a careful review of the evidence, presented by Mrs. Hern, I am upholding her recommendation. The evidence she presented is as follows: Mrs. Florence Quintana (Guidance Counselor) informed Mrs. Hern that Veltran Trujillo had a gun in his P.E. locker. Second, in asking Veltran to empty his pockets he pulled out a clip with 5-.22 bullets. Third, in Mrs. Hern's presence he admitted to me to having a gun in his P.E. locker. He opened his locker and I removed the gun.

> Because of the seriousness of this incident, having a firearm in school, I feel that Mrs. Hern's recommendation for expulsion from Taos Schools is fair and just. If you have any questions, call. . . .

(Mem. of Law in Supp. of Pls.' Mot. for Summ. J. Ex. 2.) Some of Student's teachers had recommended that he not be expelled.

On January 21, 1994, Student was alleged to be a delinquent child in need of care and supervision in the Children's Division of the Taos District Court for having unlawfully carried a .22 caliber pistol to Taos Junior High School on November 15, 1993. No previous complaints or referrals had been filed against Student with the Taos Juvenile Probation Office. Student admitted the allegations in a Consent Decree on February 9, 1994. This was his first juvenile offense. Student complied with all terms of the consent decree, and the petition against him was dismissed.

On February 4, 1994, Student, by letter through counsel, requested that Principal Quintana advise him of the exact period of his expulsion. Principal Quintana did not respond to this written request. Student's counsel again requested this information by letter of March 10, 1994, and also asked that a "Grievance Hearing" be scheduled. Principal Quintana scheduled the "Grievance Hearing" for April 14, 1994, and he, Assistant Principal Hern, and Mrs. Trujillo and her counsel attended. At the hearing, Principal Quintana refused to reconsider Student's expulsion. He also advised Plaintiffs to see Superintendent Aragon if they were unsatisfied with his decision.

Plaintiffs' counsel requested by letter on April 20, 1994, that Superintendent Aragon reconsider Student's expulsion and agree to meet with Plaintiffs and their counsel. Superintendent Aragon stated by letter of April 26, 1994, that he would notify Plaintiffs' counsel of the time and date for a meeting as soon as he met with appropriate staff and reviewed the case. Superintendent Aragon never scheduled a meeting.

Following his expulsion from Taos Public Schools, Student attended a private school in Taos. The nearest public schools are 20 to 30 miles away.

In Count I of the first amended complaint, Plaintiffs allege violation of the Fourteenth Amendment of the United States Constitution in that Student

> is being: (a) punished without adequate written notice of the possible penalties of prohibited conduct; (b) punished without adequate written notice to him and his parents of the possible penalties resulting from the charges against him; (c) punished pursuant to a Board of Education rule, state statute, and Student Handbook which are invalid on their faces and as applied; (d) punished without reference to promulgated rules and regulations; (e) denied a proper hearing prior to punishment which includes adequate prior notice of charges, and [*sic*] opportunity to prepare for a hearing, [and] a proceeding in which the burden of proof is on the school board to show a material disruption has occurred; (f) denied a fair and impartial decision; (g) punished by authorities who lack adequate authority for imposing the particular penalty imposed; (h) denied adequate written notice of the penalty imposed and the reasons

> for the same; (i) treated differently from other pupils in the school; (j) punished arbitrarily without reasonable basis; (k) denied access to public education; and (l) denied . . . [the] right to appeal to a higher authority the decision expelling him.

(First Amended Complaint at ¶ 40). In Count I, Plaintiffs further allege that the expulsion "interferes with [Student's] education in the public schools by preventing him from keeping pace with the instruction given to the rest of his class . . . [and denies] him educational and recreational amenities and benefits other children in his area enjoy." (*Id.* ¶ 41.) Plaintiffs also purport to represent class members who "are presently being subjected to a denial of fundamental civil right [*sic*] for which there is no adequate remedy at law in that they are presently being denied their right to a public education," (*Id.* ¶ 42), and use exactly the same language quoted above, (a) through (l), on behalf of the class. Counts II and III allege breach of contract and prima facie tort, respectively.

III. CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court next addresses the parties' cross motions for summary judgment. Defendants contend that they are entitled to summary judgment on grounds Plaintiffs were provided due process, Defendants are entitled to qualified immunity, and Plaintiffs failed to exhaust post-deprivation administrative remedies. Plaintiffs move for summary judgment on claimed violation of their federal constitutional rights to procedural due process and equal protection and breach of contract.

Summary judgment may properly be granted if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Pleadings and documentary evidence must be liberally construed in favor of the nonmoving party. *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1379 (10th Cir. 1994). If the moving party satisfies its initial burden demonstrating the absence of any genuine issue of material fact, the nonmoving party must identify sufficient evidence requiring submission of the case to a jury. *Id.*

A. Defendants' Motion for Summary Judgment

1. Qualified Immunity

As qualified immunity shields government officials from liability, ensuring that erroneous suits do not go to trial, the Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995) (*quoting Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). The Supreme Court enunciated the standard by which claims of qualified immunity are to be evaluated in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) providing that government officials performing discretionary functions are not liable for their conduct, "unless their actions violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1518 (10th Cir.); *cert. denied*, 502 U.S. 1013 (1991). The Court determines whether the law was clearly

established by examining the law as it was at the time of the defendant's actions. *Id.*

Once pled, the plaintiff bears a two-part burden. First, the plaintiff must demonstrate that "defendant's actions violated a constitutional or statutory right." *Albright*, 51 F.3d at 1534. Secondly, the plaintiff must show that "the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.* (*citing Davis v. Scherer*, 468 U.S. 183, 197 (1984)).

Thus, the first determination that the Court must make is "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (quoted in *Albright*, 51 F.3d at 1534). The plaintiff must identify "the clearly established constitutional right and the defendant's conduct which violated the right with specificity," *Albright*, 51 F.3d at 1535 (*quoting Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995)), and "to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,' " *Id.* (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). While the act in question "does not have to have previously been held unlawful, 'in the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (*quoting Anderson*, 483 U.S. at 640). This is ordinarily indicated by a Supreme Court or Tenth Circuit decision on point, or by the clearly established weight of authority from other courts. *Id.*

If the plaintiff fails to meet either part of the burden, the defendant is entitled to qualified immunity. *Id.* If the

plaintiff meets this burden, only then does the burden shift to the defendant. *Id.* The defendant then "must show 'that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.' " *Id.* (*quoting Hinton v. City of Elwood*, 997 F.2d 774, 779 (10th Cir. 1993)).

Plaintiffs first responded to the motion for qualified immunity, which at that point was a motion for judgment on the pleadings,[6] by stating that the matter required discovery. Plaintiffs further asserted that the issue should be determined by summary judgment motion or by a jury.

Qualified immunity, as discussed above, is certainly not a jury issue. While qualified immunity serves as "an important protection against subjecting government officials 'either to the cost of trial or to the burden of broad-reaching discovery[,]' . . . there is a narrow right to discovery limited to the issue of qualified immunity." *Cole*, 43 F.3d at 1387 (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "[S]uch discovery must be tailored specifically to the immunity question[, and t]he plaintiff is required 'to demonstrate how discovery will raise a genuine fact issue as to [the defendants'] qualified immunity claim.' " *Id.* (*quoting Lewis v. City of Fort Collins*, 903 F.2d 752, 758 (10th Cir. 1990)).

There has been no such showing in this case. Discovery has been stayed pending ruling on the issue of qualified immunity by order of the magistrate. Plaintiffs have not appealed that order.

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[6] *See supra* n.1.

Plaintiffs have done little to enlighten the Court as to exactly which constitutional or statutory rights Defendants' actions violated or that these constitutional or statutory rights allegedly violated were clearly established at the time of Defendants' actions. Citation to appropriate case law is for practical purposes nonexistent. The Court will, however, analyze this issue in light of the allegations pled in the first amended complaint.

In *Goss v. Lopez*, the Supreme Court held that while the right to a public education is not a fundamental, constitutional right, once a state has extended the right of education, it must meet minimal due process requirements when depriving students of that right, 419 U.S. 565, 572-574 (1975). At a minimum, due process requires "that deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 579.

In the case of students facing suspension of 10 days or less, the *Goss* Court held due process requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. These minimal requirements guard against "unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Id.* There need be no delay between notice and hearing, and, in cases of students posing a continuing danger or an ongoing threat of disruption, notice and hearing need not precede removal from school, although notice and "rudimentary hearing" should follow as soon as practicable. *Id.* at 882. Additionally, short suspensions do not invoke

the rights to counsel, to confront and cross-examine witnesses, or to call one's own witnesses. *Id.* at 583. The Supreme Court further stated, however, that "[l]onger suspensions or *expulsions* for the remainder of the school term, or *permanently, may* require more formal procedures." *Id.* at 584 (emphasis added).

These, then, are the constitutional parameters thus far established by the Supreme Court in the case of short-term suspensions of students from public schools. The Court, to date, has not spoken specifically to what is required for longer suspensions and expulsion. Additionally, no Tenth Circuit cases have been brought to this Court's attention, and it, too, has found none in its research.

Other courts, however, have addressed the issue of what process is due in expulsion of students from school. In *Dillon v. Pulaski County Special Sch. Dist.*, the court found that "when a student faces expulsion, it has been recognized that due process may require that the student be permitted an opportunity to be heard, notice of the time and place of the hearing, right to counsel,[7] and the right to confront the school official or teacher having

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[7] *But see Sykes v. Sweeney*, 638 F. Supp. 274, 279 n.4 (E.D. Mo. 1986) ("At least two circuits do not recognize an absolute due process right to have an attorney present to conduct a student's defense. *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir. 1983); *Gabrilowitz v. Newman*, 582 F.2d 100, 104 (1st Cir. 1978). *See also Jaska v. Regents of the Univ. of Michigan*, 597 F. Supp 1245, 1252 & n.8 (E.D. Mich. 1984)").

primary knowledge of the facts relevant to the disciplinary proceeding," 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979).

In *Craig v. Selma City Sch. Bd.*, the court determined that, in the Eleventh Circuit, meaningful notice required "no more . . . than a statement of the charge" received six days prior to hearing, 801 F. Supp. 585, 591 (S.D. Ala. 1992) (*quoting Nash v. Auburn Univ.*, 812 F.2d 655, 663 (11th Cir. 1987)). The expulsion hearing must be held by an impartial decision maker and give students the right to respond to the charges, but "rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal case," and need not necessarily allow the cross-examination of witness. *Id.* at 591-92 (*quoting Nash*, 812 F.2d at 664).

The Seventh Circuit has also held that an expulsion hearing "need not take the form of a judicial or quasi-judicial trial," nor need it be conducted by persons other than school officials. *Baxter v. Round Lake Area Schs.*, 856 F. Supp. 438, 444 & n.12 (N.D. Ill. 1994) (*quoting Linwood v. Board of Educ.*, 463 F.2d 763, 770 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972)). The *Baxter* court found that both *Linwood* and *Betts v. Board of Educ.*, 466 F.2d 629 (7th Cir. 1972), though predating *Goss*, were consistent with it in that they required "more formal procedures for an expulsion hearing, including advance written notice . . . , sufficient time to prepare . . . , the right to be represented by counsel[,] and the ability to question witnesses," 856 F. Supp. at n.11. *See also Sykes v. Sweeney*, 638 F. Supp. 274, 279 (E.D. Mo. 1986) (*citing Strickland v. Inlow*, 519 F.2d 744 (8th Cir. 1975); *Dixon v. Alabama State Bd. of Educ.*, 294

F.2d 150 (5th Cir.), *cert. denied*, 308 U.S. 930 (1961); *Dillon*, 468 F. Supp. 54).

The law is clearly established, therefor, as to a student's constitutional right to notice and opportunity to be heard in regard to expulsion from public school. Thus, Plaintiffs' allegations of insufficient notice and improper hearing procedures withstand Defendants' claim of qualified immunity.

Plaintiffs' allegations of violation of a right to appeal, however, will be dismissed pursuant to qualified immunity. The Court has found no case establishing a constitutional right of appeal from an adverse expulsion hearing. In fact, the Fifth Circuit has stated that "although schools may wish to provide appellate mechanisms to cure procedural errors that can creep into initial suspension hearings, they are not required to do so by the Constitution. Due process need only be provided once." *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (1985); *see also Jarmon v. Batory*, No. CIV. A. 94-0284, 1994 WL 313063 at *7 (E.D. Pa. June 29, 1994) ("school officials' failure to comply with a state's regulations governing suspensions 'would violate state law only and would not rise to the level of a constitutional violation.' " (*quoting White v. Salisbury Township Sch. Dist.*, 588 F. Supp. 608, 614 (E.D. Pa. 1984))); *cf. Atencio v. Board of Educ.*, 658 F.2d 774, 779 (10th Cir. 1981) ("breach of state procedural requirements is not, in and of itself, a violation of the Due Process Clause"). Furthermore, even if there were such a right, it was certainly not clearly established at the time of Student's expulsion.

2. Procedural Due Process

Plaintiffs first contend that because the word "expulsion" was not defined in the Taos Junior High 1993-1994 Student/Parent Handbook and was not included on the matrix of possible punishments on the chart titled "Student Misconduct Minimum Mandatory Consequences," their constitutional rights to procedural due process were violated because they were given inadequate notice regarding possible penalty prior to Student's infraction. Plaintiffs are correct on the facts alleged, but fail to mention the matrix does include "long term suspension" and "maximum term suspension" and that long-term suspension is defined as "[r]emoval of a student from school and all school related activities for more than ten (10) days and up to the balance of the semester." (Mem. of Law in Supp. of Pls.' Mot. for Summ. J. Ex. 9 at B-10.) Additionally, the handbook also includes a section titled "Policy Regarding Weapons in School." (Reply Mem. in Supp. of Defs.' Mot. for J. on the Pleadings Ex. B at p. B-1.) This section specifically states:

> . . . no students shall bring a weapon onto school property, nor carry or keep any weapon on school property. . . .
>
> *Definition:* For purposes of this policy, a weapon is any firearm. . . .
>
> *Violations:* Any student found to be in violation of this policy shall be subject to discipline, including long-term suspension and expulsion.

Plaintiffs' argument borders on the frivolous. If long-term suspension is suspension of up to a semester, maximum-term suspension and expulsion are serious indeed.

Additionally, to establish a procedural due process violation, "a party must show substantial prejudice." *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984). Plaintiffs have not shown prejudice caused by this alleged deficiency nor cited any cases requiring that all possible penalties be exactly defined. This Court will not so require and finds that Plaintiffs had sufficient notice of serious consequences stemming from having a gun in school.[8]

Plaintiffs' claim of inadequate notice of the possible penalty in the written notice of charges similarly fails. Plaintiffs were advised in the notice of hearing that Student was "recommended for expulsion" and that "[e]xpulsion from school is permanent." Furthermore, it has been specifically held that "failure of a school to notify a parent of the possible punishments that could result from the expulsion hearing is not a violation of due process." *Baxter*, 856 F. Supp. at 445 (*citing Betts*, 466 F.2d at 633); *see also Keough*, 748 F.2d at 1081 & n.2 (notice that plaintiff's "status as a student" would be decided at

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[8] In *Craig*, the court stated that "[t]he allegation that the defendants failed to prove the plaintiffs' knowledge of the Code of Conduct and in doing so deprived them of a due process right borders on the frivolous. . . . The Court is of the opinion that to prevail on this claim the plaintiffs would be required to satisfy the trier of fact that they were reasonably unaware of any rule against fighting at school and therefor were unable, through ignorance, to conform their conduct to the rules prescribed by the school," 801 F. Supp. at 592. Here, Plaintiffs seem to contend that Student's ignorance of the term "expulsion" made him unable to conform with the rule against bringing weapons to school. The *Craig* court would not accept such an argument and neither will this Court.

hearing resulting in expulsion for one semester sufficient, especially considering previous ten-day suspension and advice of right to attorney[9]).

Plaintiffs also maintain that the November 30 hearing with Principal Quintana was improper due to inadequate notice of the charges, inadequate opportunity to prepare, and because the school board did not bear the burden of showing that Student's conduct caused a material disruption. There is no question of Student's guilt of the offense of having a gun in school. In the situation where the conduct is admitted, it has been held that "procedural errors must be related to the school's determination of an appropriate punishment." *Lamb. v. Panhandle Comm. Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987) (parenthetical explanation of *Brewer*, 779 F.2d at 263). Due process then is the opportunity to present a mitigative argument. *Id.*

Plaintiffs' contentions as to the adequacy of the hearing fail on all counts. The notice of hearing stated that Student was in violation of the weapons policy, specifically, "carrying a gun on campus." In light of Student's admission of the offense, no due process infringement could be found even if the charges against him were not included on the notice of hearing. Plaintiffs clearly knew the nature of the charge. Additionally, the admitted offense occurred on November 15, notice was sent November 17, and the hearing took place November 30.

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[9] Here, too, Plaintiffs were advised of their right to legal counsel at the hearing and to cross-examine adverse witnesses and call their own witnesses and present evidence. (Mem. of Law in Supp. of Pls.' Mot. for Summ. J. Ex. 1.)

Plaintiffs apparently failed to request a delay, despite directions for doing so on the notice of hearing. They had sufficient time in which to prepare. *See Craig*, 801 F. Supp. at 591 (six days' notice sufficient). Finally, the Court is unaware of any burden to show material disruption that should be laid upon the school board. As discussed above, where the student has admitted the proscribed conduct, the hearing is required only to determine proper punishment, after allowing the student the chance to present mitigating circumstances. Plaintiffs clearly were afforded this opportunity.

Plaintiffs also claim that they received inadequate written notice of the penalty and the reasons for same. This assertion fails on its face. Principal Quintana sent a written decision to Plaintiffs on December 17. In it, he clearly stated the circumstances and his decision. *See supra* at 6. In any case, it has been held that a written opinion containing findings of fact is not required by due process. *Long v. Thornton Township High Sch.*, 82 F.R.D. 186, 192 (N.D. Ill. 1979) (*citing Betts*, 463 F.2d at 770). Additionally, due process is a flexible concept, and, in the absence of a showing of prejudice, the Court will not find the "failure to afford a formalism . . . violates due process." *Id.* (oral statement of reasons for expulsion not required, clear student expelled for participation in assault; "due process requires no more").

Plaintiffs maintain that Student was denied a fair and impartial decision, but fail to provide any evidence to support this assertion. Hearing officers are presumed to be unbiased, with the absence of any allegation of prejudice or bias precluding a finding of denial of due process. *Brewer*, 779 F.2d at 264; *Long*, 82 F.R.D. at 192 & n.3 (*citing*

Murray v. West Baton Rouge Parish Sch. Bd., 472 F.2d 438, 443 (5th Cir. 1973)).

Plaintiffs' claim that Principal Quintana lacked adequate authority to permanently expel Student from Taos public schools is also without merit. Pursuant to N.M. STAT. ANN. § 22-5-4(A) (Michie 1978), local school boards are empowered to supervise and control public schools within their district, subject to regulation by the state board. State board regulations authorize permanent expulsion of students from the public schools and allow school boards or administrative authorities to involve other school staff in the enforcement of rules of student conduct. State Board of Education Reg. No. 81-3 at p. 3-02-013. "Expulsion" can mean permanent removal of a student from school. *Id.* at 3-02-015. Thus, absent a constitutional violation, Principal Quintana had ample authority to expel Student. *See Craig*, 801 F. Supp at 593. Clearly, Student was not punished without reference to promulgated rules and regulations,[10] and the Court has not been shown that any of these rules, regulations, and statutes are invalid in any manner whatsoever.

3. Substantive Due Process

To the extent Plaintiffs have alleged substantive due process claims, the Court finds them meritless. It is true

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[10] The Court notes once again, however, that while Defendants' actions are authorized by New Mexico statutory law, state school board regulations, and the junior high school student/parent handbook, violation of the same does not necessarily rise to the level of a federal constitutional deprivation. *See supra* p. 16.

that Student has been permanently barred from the right to a public education and all of the privileges therein, but this has not been done arbitrarily, without reasonable basis, as Plaintiffs' maintain. The right to a public education is not a fundamental right, and, thus, to be found constitutional, impingement of that right need only satisfy rational basis scrutiny. *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989), *cert. denied*, 496 U.S. 941 (1990); *Brewer*, 779 F.2d at 263; *Jarmon*, 1994 WL at *10; *Craig*, 801 F. Supp. at 595; *Dillon*, 468 F. Supp at 56. Expelling a student for carrying a gun to school is certainly rationally related to the vital state interest in providing a safe environment conducive to learning, protecting students and staff, and maintaining discipline in public schools.

4. Equal Protection

Plaintiffs' equal protection claim fails for the same reasons as do any substantive due process claims. The right to an education is not a fundamental right, and Plaintiffs have not alleged any suspect classification. Therefor, expelling student is not unconstitutional so long as the purpose was legitimate and the means were rationally related to the purpose. *See Jarmon*, 1994 WL at *11; *Craig*, 801 F. Supp at 596. Taos public schools have legitimate reasons to discipline students bringing guns to school, including providing a safe environment conducive to learning, protecting students and staff, and maintaining discipline, and this Court cannot and will not say that expulsion is not rationally related to those purposes.

Thus, summary judgment will be granted to Defendants on all of Plaintiffs' federal constitutional claims.

Additionally, as Student has no federal cause of action, he cannot represent a class of similarly-situated individuals claiming federal constitutional violations, and any such claims will also be dismissed.

In so ruling, the Court bears in mind that,

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Wood v. Strickland, 420 U.S. 308, 326 (1975). The Court is not unsympathetic to Plaintiffs' plight in view of the harsh penalty visited upon Student. Neither is the Court pleased by the fact that Defendants apparently failed to implement review procedures required by state regulation.[11] In this respect, Defendants' argument that Plaintiffs' failed to exhaust administrative remedies is most

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[11] Pursuant to SBE Regulation No. 81-3 at 3-02-021:

> Unless the local school board was the disciplinarian, a student aggrieved by a disciplinary decision after a formal hearing shall have the right to have the decision reviewed if the penalty imposed was at least as severe as a long-term suspension or expulsion, an in-school suspension exceeding one school semester or a denial or restriction of student privileges for one semester or longer. . . . Local school boards shall

egregious. As explained *supra*, however, the Court cannot hold that these matters rise to the level of federal constitutional violations.

5. Supplemental Jurisdiction

Plaintiffs also assert state law claims of breach of contract and prima facie tort. Supplemental jurisdiction over these claims rests in 28 U.S.C. § 1367(a). As all of Plaintiffs' federal claims will be dismissed, in the interest of judicial economy the pendent claims also will be dismissed, pursuant to 28 U.S.C. § 1367(c) (3): "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if – . . . (3) the district court has dismissed all claims over which it has original jurisdiction." The Court notes that the federal claims are being dismissed at an early stage in the proceedings, discovery has not yet taken place, the parties have devoted only minimal time to the state law claims, and the state law claims invoke no federal policy. *See Jarmon*, 1994 WL at *12. Such dismissal, however, is without prejudice, and these claims may be brought anew in state court. *See* 28 U.S.C. § 1376(d); *Jarmon* 1994 at *13 n.4.

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establish appropriate mechanisms for review except where the local board was the disciplinarian.

Defendants appear to have included a retyped, verbatim copy of these regulations in the Taos Municipal Schools Policy Handbook. Copying the regulations, however, clearly does not establish a review procedure. There most likely was no established review procedure available to Plaintiffs at the time of Student's expulsion. If there was, they certainly were not informed of such at that time.

B. Plaintiffs' Motion for Summary Judgment

Due to the disposition of Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment will be denied as moot.

IV. DEFENDANTS' MOTION FOR EXTENSION OF TIME IN WHICH TO ANSWER FIRST AMENDED COMPLAINT

Due to the disposition of Defendants' Motion for Summary Judgment and dismissal of state law claims, this motion, too, will be denied as moot.

An order consistent with this memorandum opinion will be entered by the Court.

/s/ C. LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

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